(3)

No. 06-603

In the

Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,
Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,
Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE ARC OF THE UNITED STATES, THE CENTER ON CHILDREN AND FAMILIES, THE CENTER FOR RIGHTS OF PARENTS WITH DISABILITIES, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL DISABILITY RIGHTS NETWORK, THE SYRACUSE UNIVERSITY CENTER ON HUMAN POLICY, LAW AND DISABILITY STUDIES, AND LAW PROFESSORS STEPHEN F. BEFORT, PETER BLANCK, ROBERT A. BURT, MARY CROSSLEY, ROBERT D. DINERSTEIN, ELIZABETH F. EMENS, CHAI FELDBLUM, SETH HARRIS, SHARONA HOFFMAN, ARLENE S. KANTER, PAUL STEVEN MILLER, MARTHA L. MINOW, WENDY E. PARMET, MICHAEL L. PERLIN, ANI B. SATZ, MICHAEL SCHWARTZ, MICHAEL ASHLEY STEIN, MICHAEL WATERSTONE, AND MARK C. WEBER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici submit this brief to inform the Court of the extensive evidence of state-instigated interference with the rights of persons with intellectual disabilities to form and maintain families.[1]

Amici law professors[2] research and teach in the field of disability law and family law and have an interest in ensuring that state courts correctly apply federal statutes aimed at eradicating discrimination against persons with disabilities.

Amicus the American Association on Intellectual and Developmental Disabilities ("AAIDD") was formerly known as the American Association on Mental Retardation and under that name has appeared as *amicus curiae* in numerous cases. Founded in 1876, AAIDD is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities. AAIDD promotes progressive policies, sound research, effective practices, and human rights for people with intellectual and developmental disabilities.

Amicus The Arc of the United States, formerly known as the Association for Retarded Citizens of the United States, is the largest national voluntary organization in the United States dedicated solely to protecting the interests of the

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A complete list of *amici* law professors is set out in the appendix.

millions of adults and children with intellectual disabilities. (The Arc now uses "intellectual disability" to mean "mental retardation.") With approximately 875 state and local chapters, The Arc is well positioned to comment on the impact of state family law statutes upon people with intellectual disabilities and their children.

Amicus the Center on Children and Families ("CCF") at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and families in a variety of settings, including the Child Welfare Clinic, Gator TeamChild juvenile law clinic, and its Pro Se and Family Law clinics.

Amicus the Center for Rights of Parents with Disabilities at the Colorado Cross-Disability Coalition is a non-profit advocacy organization that provides legal assistance to parents with disabilities. The Coalition was founded in 1990 to promote independence, self-reliance, and full participation for people with all types of disabilities. It founded the Center for Rights of Parents with Disabilities in response to the widespread involvement of parents with disabilities in child welfare cases. Through direct

representation, education, research, and training, the Center combats discrimination that impacts parenting for parents with disabilities. Focused exclusively on the rights and representation of parents with disabilities, the Center is particularly suited to comment on the treatment of parents with disabilities in child welfare systems.

Amicus the Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental illness and mental retardation. The Bazelon Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes the rights of individuals with mental disabilities to participate equally in society, including the rights to have families and raise children. The Center has extensive experience with child welfare and mental health systems across the country.

Amicus the National Disability Rights Network ("NDRN"), formerly the National Association of Protection & Advocacy Systems, is the membership association of protection and advocacy systems located in all 50 States, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). Protection and advocacy systems ("P&A's") are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of people with disabilities in a variety of settings. Collectively, the P&A network is the nation's largest provider of such services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act.

Because of its national P&A membership and familiarity with the protections afforded by each State to persons with disabilities, NDRN has firsthand knowledge of state laws and how they operate in practice. NDRN is thus well placed to assist the Court in surveying the impact upon persons with disabilities of state laws regarding the termination of parental rights.

Amicus the Syracuse University Center on Human Policy, Law and Disability Studies ("CHPLDS") is dedicated to the study and promotion of inclusion and equality for people with disabilities locally, nationally, and globally. The CHPLDS is an expansion of the Center on Human Policy, which was founded in 1971 as a Syracuse University based organization involved in the national movement to secure the rights of people with disabilities, particularly people with cognitive disabilities. In 2004, the Center expanded to become the nation's first university-based multi-disciplinary center to facilitate a critical examination of disability as an aspect of diversity in society through academic programs, research, training, advocacy, and public education. The CHPLDS is joined as *amicus* with the College of Law's Disability Law and Policy Program, which is part of the CHPLDS, and which houses the nation's first joint degree program in law and disability studies.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioners that this Court should grant certiorari on the question presented in the petition—whether Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, applies to termination of parental rights proceedings initiated by state agencies and prosecuted in state courts. The Rhode Island Supreme Court

has held that because a termination of parental rights proceeding is "'for the benefit of the child, not the parent,'" Petition App. 11a (quoting *M.C. v. Department of Children and Families*, 750 So. 2d 705, 706 (Fla. Dist. Ct. App. 2000)), such a proceeding "does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA." *Id.* As the Petition demonstrates, the decision squarely conflicts with the decision of this Court in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), which construed the same title of the ADA to apply to state prisons. The decision also contradicts holdings by the courts of at least two other States, which have held that Title II applies to state termination of parental rights proceedings. Petition at 7-18. Petitioners correctly note that this Court is the only tribunal capable of correcting such errors and variances in the application of a federal statute. *Id.*

Amici file this petition to stress to the Court that discrimination against parents with intellectual disabilities is a widespread and serious problem. Carrying on a shameful tradition of discrimination against people with disabilities, the States are still erecting legislative, administrative, and judicial obstacles to impede persons with intellectual disabilities from creating and maintaining families. This case directly implicates an issue of exceptional importance to millions of parents with intellectual disabilities.

This Court has long recognized that natural parents possess a fundamental liberty interest in the care and upbringing of their children. *Santosky v. Kramer*, 455 U.S. 745 (1982). Parents with intellectual disabilities, no less than other parents, have a fundamental liberty interest in having and raising children, an interest which may not be

extinguished on the basis of blanket legal presumptions about their status as unfit parents. *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972). Nonetheless, parents with intellectual disabilities lose their children in state termination proceedings at an astonishing rate.[3]

This rate of termination cannot be explained by reference to the natural abilities of people with intellectual disabilities to act as parents. Researchers have demonstrated that with reasonable accommodation, people with intellectual disabilities can act as competent and loving parents.[4] The effort necessary to keep a family united could be as minor as providing a parenting plan in a comprehensible format or providing training in particular tasks such as diapering or food preparation.[5] Sadly, however, many States refuse to make even minor and manifestly reasonable accommodations. As a result, people with intellectual disabilities retain their parental rights to their children only at the sufferance of state agencies and state courts. Worse, this arbitrary and unreasonable state discrimination systematically deprives the children of such parents of their constitutional and natural rights to the undisturbed love and nurture of their parents.

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[3] David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 299-300 (2002) (estimating rate as between 40% and 60%).

[4] Maurice A. Feldman, *Parenting Education for Parents with Intellectual Disabilities: A Review of Outcome Studies*, 15 RES. DEV. DIS. 299, 301 (1994); Maurice A. Feldman & Laurie Case, *Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning*, 24 J. INTELL. & DEVELOPMENTAL DIS. 27, 28 (1999)

[5] Feldman, *supra* note 4, at 310-12, 329; Feldman & Case, *supra* note 4, at 28, 38.

Neither Petitioners nor *amici* claim that every parent with an intellectual disability is entitled to retain custody of his or her child in every case. Like a physical disability such as blindness or paraplegia, an intellectual disability may indeed affect certain aspects of an individual's ability to parent. Petitioners and *amici* claim only that before acting to terminate parental rights, the State must do what the ADA requires: ensure that it has provided reasonable accommodation of the parent's intellectual disability, or that it has taken into account how the parent's capabilities could improve if reasonable accommodations were afforded.

As the decision of the Rhode Island Supreme Court exemplifies, many state courts are not willing to require such accommodations to be provided before the parent's inadequacy is adjudicated despite the clear contrary mandate of the ADA. As a clearly erroneous application of federal law on an issue of extreme importance to parents with intellectual disabilities and their children, this decision merits this Court's review and reversal.

REASONS FOR GRANTING THE PETITION

States have long placed substantial obstacles in the paths of persons with intellectual disabilities who seek to form families. Today, parents with intellectual disabilities are still subject to deliberate state-instigated discrimination in their enjoyment of the fundamental right to have and to raise children. This Court should grant review because only the application of the ADA to state proceedings directed at the termination of parental rights can protect families headed by parents with intellectual disabilities from discrimination by state courts and agencies.

1. In a particularly unfortunate chapter of this country's history, state legislatures motivated by eugenicist ideals sought to prevent persons with intellectual disabilities from forming families. By 1913, 24 States barred "imbeciles," "idiots," "lunatics," the "feebleminded," or those of "unsound mind" from marriage.[6] Many such laws remained on the books until recently.[7] During the same period, the States began to enact statutes authorizing the involuntary sterilization of "mental defectives." The Supreme Court endorsed this practice in *Buck v. Bell*, 274 U.S. 200, 205 (1927), a decision that ranks with *Plessy v. Ferguson*, 163 U.S. 537 (1896), as one of this Court's least defensible moments. In the decades following this decision, dozens of States implemented programs of compulsory sterilization by passing laws modeled on the statute upheld in *Buck*.[8] As of 1960, the States had sterilized over 60,000 people deemed to be "defective."[9] As late as the 1970s, several state statutes permitted termination of parental rights on a finding of mental retardation, without more. *See, e.g.*, *Helvey v. Rednour*, 408 N.E.2d 17 (Ill. App. Ct. 1980) (holding unconstitutional state statute that permitted the court to free for adoption, without parents' consent, the child of parents deemed mentally impaired).

2. Although state programs of involuntary sterilization have abated, the States remain hostile to the prospect of children being raised by parents with intellectual disabilities.

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[6] Phillip R. Reilly, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 26 (1991).

[7] Samuel J. Brakel, John Parry, Barbara A. Weiner, THE MENTALLY DISABLED AND THE LAW 532-38 (3d ed. 1985) (As of 1985, twenty-one states still prohibited marriage of persons who are "insane," "weak-minded," "imbeciles," or similar.).

[8] Reilly, *supra* note 6, at 45-55, 88.

[9] *Id.* at 94.

State animus towards parents with intellectual disabilities is writ on the face of dozens of state statutes authorizing termination of parental rights. In August 2005, at least thirty States expressly included "mental deficiency" or "developmental disability" as a ground for the termination of parental rights. *See* Pet. Br. at 21 & n.15. Although these statutes require some showing that the parent's intellectual disability will create an inability to discharge parental responsibilities, such statutes inevitably and impermissibly focus the court's inquiry on the parent's disabled status or condition rather than on her conduct towards her child. By analogy, consider a statute that would authorize termination of parental rights if a parent's *poverty* created an inability to discharge parental responsibilities. Such a statute would explicitly single out a parent's financial means as a predicate for a finding of neglect. Nobody could condone instigating an inquiry of parenting ability on the basis of a person's financial status *per se*. Where people with intellectual disabilities are concerned, however, many States do condone such status-based inquiries. As a result, it is only such people whose performance as parents is subject to scrutiny on a *per se* basis.

3. Apart from openly proclaiming discriminatory state animus, a termination of parental rights statute that mentions intellectual disability acts as a covert invitation to a state court to treat parents with intellectual disabilities unfairly. This invitation is all too often accepted. Judicial discrimination against parents with intellectual disabilities manifests itself in two guises. First, state courts frequently will terminate the parental rights of persons with intellectual disabilities with little or no cause, even as they leave children in the custody of their "normal" parents despite the presence of substantial evidence of neglect or abuse. As

commentators have noted, "injecting a parent's mental retardation into the calculus . . . result[s] in the application of higher standards of parenting than are applied to other parents."[10] Second, when dealing with parents with intellectual disabilities, state courts will presume that no improvement in parenting skills will occur, or that any improvement will be inadequate. *See, e.g., South Carolina Dep't of Soc. Servs. v. Humphreys*, 374 S.E.2d 922 (S.C. Ct. App. 1988). Troublingly, in making such determinations, state courts frequently rely on the testimony and conclusions of witnesses who appear to think that people with intellectual disabilities cannot or should not act as parents. *See, e.g., In re C.M.*, 556 P.2d 514, 518-19 (Wyo. 1976); *In re McDonald*, 201 N.W.2d 447, 449-50, 452 (Iowa 1972). By opening the door to testimony from biased observers, a statutory authorization to consider the impact of a parent's intellectual disability inevitably prejudices the parent.

4. Systematic discrimination by state courts, agencies, and legislatures against parents with intellectual disabilities has taken its predictable toll. Statistics indicate that children of parents with intellectual disabilities are removed from their parents with alarming frequency: researchers estimate that such children are removed from their parents at "unusually high rates, in the range of 40 percent to 60 percent."[11] Other research has demonstrated that this high toll arises from prejudice rather than from genuine concern over children's welfare. For example, in a study of 206 consecutive cases before a Boston juvenile court, researchers found that 31 of the cases, or over 15%, involved children from families

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[10] MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 271-72 (1999).

[11] McConnell & Llewellyn, *supra* n.3, at 297.

where one or both parents had an IQ lower than 79.[12] Disturbingly, the researchers found that despite the fact that the parents in this group had *less* prior court involvement and *greater* compliance with court-ordered services, these parents had their children removed as frequently as substance-abusing parents and *more* frequently than parents with no diagnosis.[13] As this study demonstrates, the parents with intellectual disabilities were subjected to stricter standards, and suffered harsher outcomes, than the other parents — a result symptomatic of systematic discrimination against such parents.

5. The termination of a parent's rights to his child is one of the most severe forms of action that a state entity can take. *Santosky*, 455 U.S. at 759. As the Petitioners have demonstrated, the ADA applies by its plain terms to termination of parental rights proceedings prosecuted by state entities in state courts. *See* Pet. Br. at 9-10. The ADA's purpose is to prevent individuals with disabilities from suffering purposeful, unequal treatment resulting from "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a). When state courts target people with intellectual disabilities for harsher treatment during termination of parental rights proceedings, they violate the rights to equal treatment and to individualized assessment safeguarded to such parents by the ADA and engage in precisely the sort of discrimination that Congress intended to extinguish. With the provision of the

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[12] Carol G. Taylor, *et al.*, *Diagnosed Intellectual and Emotional Impairment Among Parents Who Seriously Mistreat Their Children: Prevalence, Type, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 395 (1991).

[13] *Id.* at 398.

reasonable accommodations required by the ADA, many parents with intellectual disabilities, including in all likelihood the petitioners in this case, could retain their rights to the care and nurture of their natural children. Only the application of the ADA to such determinations can protect parents with intellectual disabilities and their children from discrimination by state entities.

CONCLUSION

The Petition for certiorari should be granted.

Respectfully submitted,

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